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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1940

CARL F. KORTEPETER,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

GURNEY G. DERBYSHIRE,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF JUDGMENT DENYING CERTIORARI
With Supporting Brief

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PETITION FOR REHEARING OF JUDGMENT DENYING CERTIORARI

Petitioners Carl F. Kortepeter and Gurney G. Derbyshire each respectfully move the Court to grant a rehearing of the order entered December 16, 1940, denying certiorari

in the above cases, and upon such rehearing to grant writs of certiorari as prayed in the original petition herein.

In support of such application for rehearing, petitioners respectfully submit the annexed brief.

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Carl F. Kortepeter and
Gurney G. Derbyshire.

ERNEST R. BALTZELL,
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BRIEF ON PETITION FOR REHEARING

Petitioners have been convicted of conspiracy to defraud the United States. The essence of the alleged "fraud" is the use of public moneys for an unauthorized purpose. We believe it will be conceded that if the moneys were expended for an authorized purpose, the fact that the expenditure inured to the benefit of a relative of the respon-

sible official did not render the use unauthorized. Nepotism does not constitute fraud upon the United States within Section 37 of the Criminal Code, however morally reprehensible.

Firmly believing that the result reached by the jury and by both Courts below would seem patently fantastic if this element of nepotism were disregarded, and that apart from this the petitioner Derbyshire has been convicted of corrupt intent to defraud upon evidence which at most shows only negligence, we earnestly urge this Court to reconsider its order denying certiorari in the above cases. Since the Government's brief opposing certiorari advances what would appear to be all possible contentions in support of the judgment below, our presentation will take the form of a reply to that brief.

I

The trial court erroneously submitted to a jury, and the Circuit Court of Appeals erroneously accepted the jury's verdict upon a question of law involving the construction of written documents and their application to uncontroverted extraneous facts, and this error resulted seriously to the prejudice of both petitioners.

That the Circuit Court of Appeals did give effect to a jury verdict upon a question of construction, without passing upon that question as matter of law, is tacitly admitted by the following language in the brief for the United States:

> "If the abstract principle urged by the petitioners, that the construction of written instruments is a question of law for the decision of the trial court,

> has any application here, the petitioners clearly were not prejudiced by the submission of the issue of authorization to the jury. The argument heretofore advanced makes it manifest, we believe, that the trial court would have had to determine that the work done with W.P.A. funds and labor on petitioner Derbyshire's land did not come within the purview of authorized work." (pp. 16-17.)

We submit that the "argument advanced" does *not* make this proposition "manifest." The conclusion can only be reached by ascribing controlling force to certain writings not legally controlling, by ignoring writings in fact controlling, and by implying unwarrantable restrictions into controlling writings which do not express such restrictions.

Take for example the asserted limitation of the use of funds to "existing roads," presumably meaning that use was limited to roads used as such at the time of the last "project proposal." No such limitation is found in any Presidential Letter. The *last* Presidential Letter allots funds "to improve county owned roads throughout Marion County." (Ex. 4, II R. 173, 175.)

The roads here in question were dedicated to public use and the dedication was accepted by the proper public authority, the Board of Commissioners of Marion County. (Ex. A, II R. 304.) Ancient authority recognizes this method of creating a public road. *Rex v. Mellor,* 1 Barn. & Adol. 32, 35. No claim is made that the roads did not thus become *county owned* roads. No claim is made that the work done was not within the specific description of the authorization, namely "filling," "grading," "cutting ditches," and "clearing."

Moreover, this authorization follows the exact language of the application (Ex. 3, II R. 170-172) which also contains the specific statement that "this new application is for continuation of work formerly approved including additional units not formerly estimated." (Ex. 3, II R. 172.)

To obtain the asserted limitation to "existing roads" counsel refer simply to the "proposal" and "letter" and the opinion of the Circuit Court of Appeals, and *assert* without argument that these "did not contemplate the construction of any new roads." They thus attempt to give the "proposal" controlling force over the "letter," as well as the "application"; and to ignore the direct reference to the continuation of work previously authorized by the "letter" of 1937 (Ex. E, II R. 307, 319) which admittedly authorized new construction. Moreover that part of the "proposal" itself upon which reliance is placed is not found in the project description (Ex. 2, Item 4, II R. 154) but in the justification clause (Ex. 2, Item 17, II R. 156), which is "a short concise statement giving reason or necessity for the proposed project," and which, while referring to the repair and rehabilitation of roads damaged by winter, does not contain any express limitation to "existing roads" or exclusion of new construction. "Manifestly" it is the sheerest sophistry so to construe the authorization.

The Government's brief also says, "The proposal specifically listed some 59 streets or roads upon which repair or improvement was contemplated." The list referred to forms no part of the "proposal," which consists of but 5 pages. The proposal itself makes no reference to any subjoined exhibit or list. The list itself makes no reference to the proposal. Its purely apocryphal presence was not explained at the trial, nor did the indictment charge

that funds were expended on "unlisted" roads. Hence, it is purely an assumption that this apocryphal list, not mentioned in proposal, application, or letter, prescribes the limit of the construction permitted.

Application to the instant case of Indiana State Bulletin No. 27, dated October 28, 1935, also rests on unsupported assumption. Just how or by what authority a bulletin issued by the Indiana State Administrator in 1935 could control a Presidential authorization of 1938 is nowhere explained. It is merely assumed. Moreover, the phrase "specific purposes outlined in the project proposal" would seem to refer to proposals specifying work at particular locations, not to "blanket" or "county-wide" projects like the ones here in question, which by the very terms of the Presidential authorizations were "In addition to projects specifically approved" (Ex. 4, II R. 175), or "Exclusive of projects specifically approved." (Ex. E, II R. 319, Ex. F, II R. 332.)

Limitation to "farm to market highways" is based on the same sort of argument as the imaginary limitation to "existing roads." This phrase is not found in either the Presidential Letter of August 12, 1938 (Ex. 4, II R. 174, 175), the application of July 11, 1938 (Ex. 3, II R. 170-172) or in the project description of the sponsor's proposal. (Ex. 2, II R. 154.) In the proposal it appears under item "17. Justification," in the phrase "The resulting work will provide a hard surface belt only on farm to market highways in this county." (Ex. 2, II R. 156.) To use this sentence as a limitation on the Presidential authorization would permit nothing but *hard surface* roads, thereby excluding gravel surfacing, which was specifically authorized by both preceding Presidential authorizations. (Ex. E, II R. 319, Ex. F, II R. 332.) This is also inconsistent

with the apocryphal list of *gravel roads* attached to the project proposal (Ex. 2, II R. 168), a further illustration of the tangled web which counsel for the Government have attempted to weave.

Reference is also made to the language of the Appropriation Act, which it is said "required that the projects upon which the money was to be expended be useful public projects," and by indirection it is asserted that these roads were outside this definition because (it is claimed) "The work enured to the benefit of the owner of a tract of land which had not yet been subdivided, and the work admittedly benefited no one but himself." (Brief, p. 14.)

Considering an almost identical argument made in *Rindge Co. v. Los Angeles County,* (1923) 262 U. S. 700, this Court said (pp. 706-707):

> "The ranch owners concede that a genuine highway, in fact adapted as a way of convenience or necessity for public use and travel, is a public use. Their real contention is that these particular roads, while called highways, are 'highways' in name merely, that is, that they are shams under the name of public improvements, which cannot, in fact, furnish ways of convenience or necessity to the traveling public. This argument is based upon the fact that they extend through the ranch alone, the main road terminating within its boundaries, and connect with no other public roads at their western and northern ends. These roads will, however, be open to the general public to such extent as it can and may use them. * * * It is not essential that the entire community, nor even any considerable portion, should directly enjoy or participate in any improvement in order to constitute a public use."

This argument is sought to be bolstered by reference to Indiana State Bulletin No. 103, forbidding W.P.A. work on *streets* in undeveloped areas where abutting property is in the hands of a small number of individuals. This argument assumes that violation of the order of a state administrator, even if authorized, would constitute *fraud* upon the United States, and also wholly ignores the fact that the bulletin is much broader than General Letter 190, upon which it purports to be based. General Letter 190, (Ex. 69, II R. 180) has on its face no application to the prosecution of work but prescribes eligibility requirements as a guide to the preparation of project applications.

Finally it is sought to render inapplicable the broad authorization of the original Presidential letter of July by the assertion "that the word 'construct' was *undoubtedly* used in the Presidential letter of July 17, 1937, because the project proposal upon which it was based sought funds not only for the repair and improvement of existing highways, but also for new construction."

The claimed basis for this assertion is the use of the word "construction" in the proposal, coupled with the wholly unwarranted assumption that to "construct roads" necessarily refers to roads not previously existing, while to "improve roads" must refer to roads then in use.

Having thus begged the question, the conclusion is drawn that the original authorization for work where easements *will be* obtained, applied only to the original project, and the supplement and continuation projects did not cover work on so-called "new roads." One is left in the dark as to whether the easements must have been granted *before* the proposal, *before* the application or merely *before* the Presidential authorizations. Obviously the existence or

non-existence of a *road* does not depend on whether it is dedicated to the public, and a public road might be "constructed" on the site of a previously used private road dedicated to public use or such a private road might be "improved" after public dedication.

This makes absurd the argument that would impose the wholly meaningless restriction to "existing roads" from the use of the word "improve" and attribute the authorization for expenditures where easements "will be obtained" to the use of the word "construct."

We submit that had the Trial Court instructed the jury that the evidence showed unauthorized use of public funds, or more specifically, that the roads built were without the scope of the project because not "existing" roads, or not "farm to market" roads, or not "public" roads or because all abutting property was owned by Derbyshire, it would clearly have been error. Yet it is now claimed that the action of the Circuit Court of Appeals in accepting the jury's verdict upon this question of construction is harmless because the jury *might* have found that for some one or more of these reasons the work was unauthorized.

The question was presented to the Circuit Court of Appeals by assigning error on the failure to direct a verdict; the Circuit Court of Appeals refused to decide it but held that "the evidence was such as to require this question to be submitted to the jury."

This, we earnestly urge, resulted in the conviction of the defendants, although the expenditure made was wholly within the scope of the authorization, merely because Kortepeter was guilty of favoring his father-in-law. This is not the crime denounced by statute, and is not the crime with which he was charged.

II

In sustaining the conviction of petitioner Derbyshire of conspiracy to defraud the United States, the Circuit Court of Appeals has permitted intent to defraud to be inferred from what was at most mere negligence.

Having resorted to a most involved process of interpretation to establish that permitted construction was limited to "existing" "farm to market" highways, and was circumscribed by a state bulletin issued in 1935 and a further state bulletin issued in 1938, and having labored to avoid application of broader language of these same writings in order to convict Kortepeter of diversion of funds, a complete change of front is made when Derbyshire's intent is in question.

There being a total absence of evidence to show Derbyshire's knowledge of any of the proposals, applications, letters, or bulletins, which are relied upon to render the work unauthorized, reliance is placed upon assertion that the work benefited "no one other than himself," and upon his close family relationship with Kortepeter.

It is asserted that Derbyshire was chargeable with knowledge "that by statutory direction W.P.A. funds and labor could be used only on useful public projects." It is not in terms asserted that this was not a "public" project, or that it was not "useful" to the public in the sense that it was not capable of being used by the public. It is merely assumed that it was not a "useful public project" because it was of primary benefit to Derbyshire. But the roads were "county owned." They were capable of public use by such members of the public as might desire to use them. It was "not essential that the entire community, nor even

any considerable portion, should directly enjoy or participate in any improvement in order to constitute a public use." *Rindge v. Los Angeles County* (1923) 262 U. S. 700, 707. There was, therefore, nothing in the statute to charge Mr. Derbyshire with knowledge that this was an unauthorized work, because it in fact was a project of public use and therefore a "useful public project" within the terms of the statute.

That the jury could properly base an inference of Derbyshire's guilty knowledge upon the family relationship between him and Kortepeter is fantastic beyond imagination. Even if Kortepeter himself had believed the work unauthorized, which conclusion, apart from the jury's verdict, is quite far fetched, in view of the total absence of any attempt at concealment or camouflage, certainly it is not matter of common experience that the relationship of father-in-law and son-in-law has matrimonial unity. Not only uncontradicted evidence, but corroborating circumstances indicate Derbyshire's belief that public dedication of the highways was the sole requisite to the lawfulness of this construction.

The rule adopted by the Circuit Court of Appeals is in effect that one acts at peril in accepting a benefit arising from the expenditure of public funds. He may be adjudged guilty of fraudulent intent because "he ought to have known," although he in fact did not know that the use was unauthorized, and even where, as here, all that he did know was such as to induce the affirmative belief that the work was authorized.

This, we submit is squarely contrary to the decisions of this Court cited in our petition for certiorari, and also squarely contrary to the general law.

2 Wharton, Criminal Law (1932) Sec. 1608, states the general rule as follows:

> "We must also hold to advance a step further, that there cannot be a negligent conspiracy. Joint evil intent is necessary to constitute the offense. 'The confederation must be corrupt. This is implied in the meaning of the term conspiracy.' "

Here uncontradicted evidence shows that Derbyshire knew only that the roads must be dedicated to public use. There is no claim that he knew of the limitations, actual or supposed, which limited authorized construction to "existing" roads, or "farm to market" roads, and are claimed to have prohibited roads abutting the lands of a single owner.

He is convicted because "he ought to have known," in short, merely because he is found negligent.

We submit that the application by the Circuit Court of Appeals of these novel and erroneous doctrines has not only seriously prejudiced petitioners, but has also placed in peril of prosecution and punishment numerous other wholly innocent individuals whose only offense is that they have co-operated with the work relief program by furnishing places to work.

We therefore earnestly urge that the action of this Court denying certiorari be reconsidered, and that such writ be granted.

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Of Counsel.

CERTIFICATE OF COUNSEL

I, Paul Y. Davis, counsel for the above-named Carl F. Kortepeter and Gurney G. Derbyshire, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

PAUL Y. DAVIS,
Attorney for Petitioners
Carl F. Kortepeter and
Gurney G. Derbyshire.